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Tan Hoo Eng v Public Prosecutor

B HIGH COURT (IPOH) — CRIMINAL APPLICATION NO AA-44–30–08 OF 2023
MOSES SUSAYAN JC
13 DECEMBER 2024

C *Constitutional Law — Fundamental liberties — Equal protection — Right of fair hearing — Several charges preferred against applicant under s 409 of Penal Code, and s 4(1)(a) read together with sub-s 87(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Amounts involved in charges reduced several times — Acknowledgment of bias and preferential treatment — Whether there was biased and unfair investigation by police — Whether there was infringement of applicant's constitutional rights under arts 5(1) and 8(1) of Federal Constitution — Whether all charges ought to be nullified — Federal Constitution arts 5(1) & 8(1)*

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Criminal Procedure — Application — Application to set aside charges — Bias and unfair investigation — Legitimacy of charges against applicant — Several charges preferred against applicant under s 409 of Penal Code, and s 4(1)(a) read together with sub-s 87(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Amounts involved in charges reduced several times — Acknowledgment of bias and preferential treatment — Whether there was biased and unfair investigation by police — Whether there was infringement of applicant's constitutional rights under arts 5(1) and 8(1) of Federal Constitution — Whether all charges ought to be nullified — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1)(a) & 87(1)

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The applicant and Mr Lim Keck Eng ('Mr Lim') were the directors and shareholders of Blue Star Moulding Sdn Bhd. On 7 April 2014, Mr Lim lodged a police report against the applicant, accusing her of criminal breach of trust ('CBT'). The investigating officer then conducted investigation against the applicant. In response, the applicant had also lodged a police report against Mr Lim, accusing him of CBT but her report was never pursued by the authorities. Subsequently, several charges under s 409 of the Penal Code ('the CBT charges'), and s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'), read together with sub-s 87(1) of AMLA ('the AMLA charges') were preferred against the applicant. During the first prosecution, the amounts involved were RM16,544,328.11 for the CBT charges, and RM25,912,989.44 for the

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AMLA charges. The prosecution later preferred more charges during the second prosecution which resulted in the increase of the amounts involved to RM26,270,022.72 for the CBT charges and RM36,660,439.44 for the AMLA charges. However, due to the admissions by Mr Lim during the trial which weakened the case against the applicant, the charges were subsequently revised in the third prosecution whereby the amounts involved were reduced to RM4,128,264.57 for the CBT charges and RM9,562,263.34 for the AMLA Charges. The amounts were further reduced during the fourth prosecution. To make matters worse, during a civil action related to the present case ('the civil proceedings'), the investigating officer admitted that he did not investigate the applicant's police report at all. Against this background, the applicant filed the present application to seek an order that all the CBT and AMLA charges be set aside, quashed, or permanently stayed, and that the applicant be acquitted and discharged from all charges. The applicant relied on the following grounds: (a) there was an unfair, tainted, and biased investigation conducted by the investigating officers against the applicant, which violated the applicant's rights under art 5(1) of the Federal Constitution to a fair trial; (b) the chronology of events showed that there was a delay in a fair trial, which violated the applicant's rights under art 5(1) of the Federal Constitution; (c) there was a mala fide prosecution, oppression, and an abuse of the court process against the applicant; and (d) the applicant had suffered prejudice, and a miscarriage of justice had occurred.

Held, ordering that all the CBT and AMLA charges to be set aside, quashed, or permanently stayed, and acquitting and discharging the applicant from all such charges:

(1) By focusing predominantly on the allegations made by Mr Lim and neglecting to adequately investigate the applicant's counter-report, the police failed to uphold the standard of impartiality required in a fair investigation. The lack of thorough investigation into the applicant's report also raised concerns about the fairness of the entire investigative process. In our system of legal proceedings, it was paramount that all parties ought to be treated equally and that investigations ought to be conducted without bias. The court considered the lack of impartiality as a fundamental issue, as it reflected a failure to ensure an unbiased investigation and potentially a miscarriage of justice (see paras 15–16).

(2) There was clear evidence that Mr Lim's report was handled with preferential treatment, deviating from standard law enforcement practices. This deviation suggested a lack of impartiality, which compromised the integrity of the investigation process. Further, during the civil proceedings, the investigating officer did not deny to socialising with the complainant, Mr Lim, and his son during the sessions court trial was in progress. This social interaction between the investigating officer

and the complainant further indicated bias and a lack of impartiality, compromising the investigation from the outset (see paras 17 & 19).

(3) In the present case, compelling evidence demonstrated that biased investigative practices were employed, significantly undermining the applicant's right to a fair trial as guaranteed under art 5(1) of the Federal Constitution. This biased investigation had seriously hampered the applicant's defence. Further, there was substantial evidence from the civil proceeding showing that the applicant was denied equal protection under the law due to different treatment of reports filed by the applicant compared to those filed by Mr Lim. This unequal treatment constituted a violation of the applicant's rights under art 8(1) of the Federal Constitution, which ensured equal protection under the law for all individuals (see paras 22, 26 & 30).

(4) In conclusion, the evidence presented in the civil proceedings conclusively demonstrated a pattern of biased and unfair investigation by the police, significantly infringing upon the applicant's constitutional rights under arts 5(1) and 8(1) of the Federal Constitution. The court also found that the bias and prosecutorial misconduct had significantly compromised the fairness of the investigation and criminal proceedings. In order to uphold the applicant's constitutional rights and the principles of justice and fairness, all the charges ought to be nullified. This decision reinforced the rule of law and ensured that the applicant, presumed innocent until proven guilty, was afforded full protection under the Federal Constitution (see paras 47 & 49).

[Bahasa Malaysia summary

Pemohon dan Encik Lim Keck Eng ('Encik Lim') adalah pengarah dan pemegang saham Blue Star Molding Sdn Bhd. Pada 7 April 2014, Encik Lim membuat laporan polis terhadap pemohon, menuduhnya melakukan pecah amanah jenayah ('PAJ'). Pegawai penyiasat kemudian menjalankan siasatan terhadap pemohon. Sebagai tindak balas, pemohon juga telah membuat laporan polis terhadap Encik Lim, menuduhnya melakukan PAJ tetapi laporannya tidak pernah disiasat oleh pihak berkuasa. Selepas itu, beberapa pertuduhan di bawah s 409 Kanun Keseksaan ('pertuduhan-pertuduhan PAJ'), dan s 4(1)(a) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLA'), dibaca bersama sub-s 87(1) AMLA ('pertuduhan-pertuduhan AMLA') telah dikenakan ke atas pemohon. Semasa pendakwaan pertama, jumlah yang terlibat ialah RM16,544,328.11 untuk pertuduhan-pertuduhan PAJ, dan RM25,912,989.44 untuk pertuduhan-pertuduhan AMLA. Pihak pendakwaan kemudiannya mengenakan lebih banyak pertuduhan ketika pendakwaan kedua yang menyebabkan jumlah yang terlibat meningkat kepada RM26,270,022.72 bagi pertuduhan-pertuduhan PAJ dan RM36,660,439.44 bagi pertuduhan-pertuduhan AMLA. Bagaimanapun,

disebabkan pengakuan Encik Lim semasa perbicaraan yang melemahkan kes terhadap pemohon, pertuduhan-pertuduhan tersebut kemudiannya disemak dalam pendakwaan ketiga di mana jumlah yang terlibat telah dikurangkan kepada RM4,128,264.57 untuk pertuduhan-pertuduhan PAJ dan RM9,562,263.34 untuk pertuduhan-pertuduhan AMLA. Jumlah tersebut telah dikurangkan lagi semasa pendakwaan keempat. Lebih memburukkan keadaan, semasa tindakan sivil yang berkaitan dengan kes semasa ('prosiding sivil tersebut'), pegawai penyiasat mengakui bahawa dia tidak menyiasat laporan polis pemohon langsung. Berdasarkan latar belakang ini, pemohon memfailkan permohonan semasa untuk mendapatkan perintah supaya semua pertuduhan PAJ dan AMLA tersebut diketepikan, dibatalkan atau digantung selama-lamanya, dan bahawa pemohon dibebaskan dan dilepaskan daripada semua pertuduhan tersebut. Pemohon bergantung pada alasan-alasan berikut: (a) terdapat penyiasatan yang tidak adil, tercemar, dan berat sebelah dijalankan oleh pegawai penyiasat terhadap pemohon, yang melanggar hak pemohon di bawah perkara 5(1) Perlembagaan Persekutuan untuk perbicaraan yang adil; (b) kronologi peristiwa menunjukkan bahawa terdapat kelewatan dalam perbicaraan yang adil, yang melanggar hak pemohon di bawah perkara 5(1) Perlembagaan Persekutuan; (c) terdapat pendakwaan mala fide, penindasan, dan penyalahgunaan proses mahkamah terhadap pemohon; dan (d) pemohon telah mengalami prejudis, dan salah laksana keadilan telah berlaku.

Diputuskan, memerintahkan supaya semua pertuduhan PAJ dan AMLA tersebut diketepikan, dibatalkan, atau digantung secara kekal, dan membebaskan dan melepaskan pemohon daripada semua pertuduhan tersebut:

(1) Dengan memberi tumpuan terutamanya kepada dakwaan yang dibuat oleh Encik Lim dan mengabaikan untuk menyiasat dengan secukupnya laporan balas pemohon, polis gagal untuk menegakkan standard kesaksamaan yang diperlukan dalam penyiasatan yang adil. Kekurangan siasatan menyeluruh terhadap laporan pemohon juga menimbulkan kebimbangan tentang keadilan keseluruhan proses penyiasatan. Dalam sistem prosiding undang-undang di negara ini, adalah penting bahawa semua pihak harus dilayan sama rata dan penyiasatan harus dijalankan tanpa berat sebelah. Mahkamah menganggap kekurangan kesaksamaan sebagai isu asas, kerana ia mencerminkan kegagalan untuk memastikan penyiasatan yang tidak berat sebelah dan berkemungkinan berlakunya salah laksana keadilan (lihat perenggan 15–16).

(2) Terdapat keterangan yang jelas bahawa laporan Encik Lim dikendalikan dengan layanan utama, yang mana ini menyimpang daripada amalan penguatkuasaan undang-undang yang standard. Penyimpangan ini mencadangkan kekurangan kesaksamaan, yang menjejaskan integriti proses penyiasatan. Selanjutnya, semasa prosiding sivil tersebut, pegawai penyiasat tidak menafikan bahawa dia beramah mesra dengan pengadu,

Encik Lim, dan anaknya semasa perbicaraan mahkamah sesyen sedang dijalankan. Interaksi sosial ini antara pegawai penyiasat dan pengadu seterusnya menunjukkan berat sebelah dan kekurangan kesaksamaan, menjejaskan penyiasatan dari awal (lihat perenggan 17 & 19).

(3) Dalam kes semasa, keterangan yang meyakinkan menunjukkan bahawa amalan penyiasatan berat sebelah telah digunakan, ini menjejaskan dengan ketara hak pemohon untuk perbicaraan yang adil seperti yang dijamin di bawah perkara 5(1) Perlembagaan Persekutuan. Siasatan berat sebelah ini telah menjejaskan pembelaan pemohon dengan serius. Tambahan pula, terdapat keterangan yang melimpah ruah daripada prosiding sivil tersebut yang menunjukkan bahawa pemohon telah dinafikan perlindungan yang sama di bawah undang-undang kerana layanan berbeza terhadap laporan yang difailkan oleh pemohon berbanding dengan laporan yang difailkan oleh Encik Lim. Layanan tidak sama rata ini merupakan pelanggaran hak pemohon di bawah perkara 8(1) Perlembagaan Persekutuan, yang menjanjikan perlindungan sama rata di bawah undang-undang untuk semua individu (lihat perenggan 22, 26 & 30).

(4) Kesimpulannya, keterangan yang dikemukakan dalam prosiding sivil tersebut secara muktamad menunjukkan corak penyiasatan berat sebelah dan tidak adil oleh polis yang mana ini dengan ketara telah melanggar hak perlembagaan pemohon di bawah perkara 5(1) dan perkara 8(1) Perlembagaan Persekutuan. Mahkamah juga mendapati bahawa berat sebelah dan salah laku pendakwaan tersebut telah menjejaskan keadilan penyiasatan dan prosiding jenayah dengan ketara. Untuk menegakkan hak perlembagaan pemohon dan prinsip keadilan dan kesaksamaan, semua pertuduhan tersebut hendaklah dibatalkan. Keputusan ini mengukuhkan kedaulatan undang-undang dan memastikan bahawa pemohon, yang dianggap tidak bersalah sehingga dibuktikan bersalah, diberi perlindungan penuh di bawah Perlembagaan Persekutuan (lihat perenggan 47 & 49).]

Cases referred to

Babubhai v State of Gujarat & Ors 2010 (12) SCC 254, SC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631; [2010] 2 AMR 231, FC (refd)

Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 MLJ 281; [1995] 1 CLJ 609; [1995] 1 AMR 622; [1995] 1 MLRA 48, FC (refd)

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199; [2021] 5 AMR 23; [2021] 5 MLRA 1, FC (folld)

Yahya Hussein Mohsen Abdulrab v PP [2021] 5 MLJ 811; [2021] 9 CLJ 414; [2021] 8 AMR 719; [2021] MLRAU 168, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1)(a), 87(1)
Federal Constitution arts 5(1), 8(1)
Penal Code s 409

Gurbachan Singh Bagawan Singh (with Amir Faliq bin Mohamad Jamil) (Sandeep Gobindeep & Co) for the applicant.
Nasrul Hadi Abdul Ghani (with Geetha Jora Singh) (Deputy Public Prosecutor, Perak State Legal Advisor's Office) for the respondent.

Moses Susayan JC:

(NOTE: At the outset, I wish to place on record that the learned deputy public prosecutor ('DPP') had formally requested that the decision in this application be deferred until after the decision/pronouncement of a related matter on appeal currently before the Court of Appeal. After considering the subject matter of the appeal, I am convinced and constrained to proceed with delivering this decision for two reasons:

(a) there is no direct bearing between the appeal and the application before this court. Although this court has substantially based its reasoning on the evidence and testimony provided by the investigating officers in the civil proceedings under appeal, the evidence and testimony remain intact on appeal, as confirmed by counsel for the applicant, who also represents the applicant in the appeal; and

(b) secondly, this case has been protracted for a very long time, and I see no valid reason to defer the decision any further. I am therefore constrained to reject the learned DPP's request.)

INTRODUCTION

[1] This judgment addresses the complex and troubling circumstances surrounding the investigation and prosecution of the applicant, exposing significant flaws where fairness and impartiality were severely compromised. The investigating officers blatantly admitted the investigation's bias and lack of fairness during civil proceedings. Furthermore, the case involved multiple prosecutions with progressively reduced charges, revealing an acknowledged bias, including social interactions with the complainant and preferential treatment. These troubling circumstances, which have emerged as new evidence, are now brought before this court in this judicial review application to decide on the legitimacy of the charges against the applicant. This court must determine whether these cumulative irregularities, especially in light of recent apex court rulings, have resulted in a miscarriage of justice that justifies

quashing all charges and acquitting and discharging the applicant.

[2] This court had previously granted an order to stay proceeding of trials in respect of criminal cases in the Ipoh Sessions Court, numbered AA-62K-(37–38)–10 of 2017, AA-62K-(39–45)–10 of 2017, AA-62K-(114–122)–12 of 2017, and AA-62K-(201–209)–08/ of 2019, until this application here in AA-44–30–08 of 2023 is fully and finally decided.

[3] Under the Application No AA-44–30–08 of 2023, the applicant seeks an order that all charges under s 409 of the Penal Code in the criminal cases numbered AA-62K-(37–38)–10 of 2017 and AA-62K-(201–209)–08 of 2019 be set aside, quashed, or permanently stayed, and further seeks that the applicant be acquitted and discharged from all charges. Further, the applicant prays that all charges under s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act ('the AMLATFA'), read together with sub-s 87(1) of the AMLATFA, in the criminal cases numbered AA-62K-(39–45)–10 of 2017 and AA-62K-(114–122)–12 of 2017 be set aside, quashed, or permanently stayed, and that the applicant/accused be acquitted and discharged from all the charges.

[4] It is also to be noted that there are other matters involving the same parties before this court, which are:

(a) Criminal Judicial Review No AA-44–6–02 of 2023 (encl 1, revision regarding the DNAA order dated 6 October 2017);

(b) Criminal Appeal No AA-42(Ors)-1–01 of 2023 (encl 22, application to cite the DPP for contempt for failure to comply with the court order dated 1 September 2023); and

(c) Criminal Appeal No AA-42(Ors)-1–01 of 2023 (encl 26, DPP's application for clarification of this court's order dated 1 September 2023)

[5] However, there was a consensus that this court's decision in respect of Application No AA-44–30–08 of 2023 could determine the necessity of hearing the other pending applications.

BACKGROUND FACT OF THE CASE INVOLVING APPLICANT

[6] The case involves the applicant and Mr Lim Keck Eng, both of whom are directors and equal shareholders of Blue Star Moulding Sdn Bhd ('BSM'). On 7 April 2014, Lim Keck Eng lodged a police report against the applicant, accusing her of criminal breach of trust ('CBT') in relation to the company's funds. Following this report, the investigating officer, Inspector Muhammad Noorariff bin Zainuddin Shah ('Insp Ariff'), initiated an Anti-Money

Laundering Act ('the AMLA') investigation against the applicant on 24 April 2014, leading to the freezing and seizure of her assets, as well as those of her family members, including her son, Lim Hui Jin.

[7] In response, the applicant filed her police report on 13 May 2014, alleging threats against her and her family by Lim Keck Eng and his associates and accusing Lim Keck Eng of CBT. However, despite being referred for investigation, the applicant's report was never pursued by the authorities.

[8] On 15 July 2015, the applicant faced her first prosecution, which included eight CBT charges amounting to RM16,544,328.11 and 21 AMLA charges totalling RM25,912,989.44. These charges were unexpectedly brought to her attention when she was summoned to the police station and arrested. She fainted in the police station and was hospitalised, and subsequent bail was set at RM2m. The prosecution later preferred more charges on 18 July 2016, in what became the second prosecution, raising the amounts involved to RM26,270,022.72 for CBT and RM36,660,439.44 for AMLA.

[9] During the trial, Lim Keck Eng made admissions that weakened the case against the applicant, which led the respondent to request a discharge not amounting to an acquittal ('DNAA') on 6 October 2017. The charges were subsequently revised downward in the third prosecution, with RM4,128,264.57 for CBT and RM9,562,263.34 for AMLA. Subsequently, further revisions and amendments to the third prosecution, which is referred to as the fourth prosecution on 19 August 2019, resulted in even lower charges, ultimately leaving the applicant facing significantly reduced charges compared to the original charges.

[10] On the whole, the prosecution's actions have led to substantial reductions in the charges, with a total of RM14,864,370.84 being dropped from the CBT charges and RM27,098,176.10 from the AMLA charges across the four prosecutions, as shown in the table below:

Prosecution	CBT	AMLA
First prosecution dated 15 July 2015	16, 544,328.11	25,912,989.44
Second prosecution dated 18 July 2016	9,725,694.61	10,747,450
Total amount for the first and second prosecution	26,270,022.72	36,660,439.44
DNAA dated 6 October 2017		
Third prosecution dated 6 October 2017	4,128,264.57	9,562,263.34

Total amount dropped by the prosecution from the first and second prosecution	-12,647,836.88	-27,098,176.10
Fourth prosecution dated 19 August 2019 after adding and amending the charges in the third prosecution	1,911,730.61	–
Total amount dropped by the prosecution from the third prosecution	-2,216,533.96	–
Total amount dropped by the prosecution after four persecutions	-14,864,370.84	-27,098,176.10

[11] This Application No AA-44–30–08 of 2023, the applicant relies on the following grounds:

(a) that there was an unfair, tainted, and biased investigation conducted by the investigating officers against the applicant, which violated the applicant's rights under art 5(1) of the Federal Constitution to a fair trial;

(b) the chronology of events shows that there was a delay in a fair trial, which violated the applicant's rights under art 5(1) of the Federal Constitution;

(c) there was a mala fide prosecution, oppression, and an abuse of the court process against the applicant; and

(d) the applicant has suffered prejudice, and a miscarriage of justice has occurred.

UNFAIR AND PARTIAL INVESTIGATION

[12] In the present case, a significant issue arises concerning the manner in which the authorities conducted their investigation into the conflicting police reports filed by the complainant, Lim Keck Eng, and the applicant.

[13] Inspector Sopawan, in evidence during trial in a civil action under Suit No AA-22NCVC-136–11 of 2018 (civil proceedings), admitted that her investigation was 'tidak lengkap, betul dan benar' (incomplete, correct, and truthful) in light of the reduced charges (see encl 2, notes of evidence — line 6216–6222). This admission further fortifies the inadequacy of the investigative process.

ADMISSIONS OF BIAS

[14] During the civil proceedings, Inspector Ariff, a central figure in the investigation, provided testimony that illuminated disparities in how the case was handled. Initially, he claimed that all reports related to the case were treated

with equal attention and care. However, under cross-examination, he made a pivotal admission that contradicted his earlier assertion. During the civil proceedings, Insp Ariff conceded that he did not investigate the applicant's police report at all. This admission revealed that the applicant's report, which was central to the investigation initiated by Lim Keck Eng, was not treated with the same level of diligence by the investigating officers. This unequal handling of the two reports highlights apparent bias toward the allegations made by Lim Keck Eng, raising serious questions about the impartiality and fairness of the investigative process. Below is the relevant portion of the cross-examination in Civil Suit No AA-22NCVC-136–11 of 2018.

Bachan: Kamu tahu bahawa Tan Hoo Eng ada buat laporan polis dan mengadu bahawa ada kesalahan kesalahan jenayah CBT dilakukan oleh Lim Keck Eng. Setuju?

Noorariff: Setuju.

Bachan: 13 Mei 2014 ya? Bundle K my lord. Tahu?

Noorariff: Tahu, betul.

Bachan: Adakah kamu pegawai penyiasat untuk laporan itu atau tidak?

Noorariff: Laporan polis ini kita refer to IP yang ...

Bachan: Can you answer the question please, were you the IO of the report? Why are you going everywhere?

Noorariff: Laporan polis ini mula mula dikendalikan oleh Komersial Ipoh.

Bachan: Can you please answer the question. Don't pretend, were you the IO of the report? Whose job, yours, yes or no? Just answer the question please, don't go there and everywhere. Yes or no ASP? No isn't it?

Noorariff: Tidak, tidak.

Bachan: Tidak, good. You agree the report is very relevant to Lim Keck Eng complaint? Look into it, read it. Read it properly the two pages. My lord it is in bundle K my lord, Tab 1 my lord. Sudah baca ke belum?

Noorariff: Sudah.

Bachan: Setuju laporan ini adalah laporan yang detail adu terhadap Lim Keck Eng?

Noorariff: Ya betul.

Bachan: Betul ya, dan ada aligasi aligasi jenayah, CBT, ya? Treaten Tan Hoo Eng, demand monies ultimately took 3 million isn't it? Simple question there is a criminal crime allegation by Lim Keck Eng. Correct? Ada?

Noorariff: Ya dalam report ini.

Bachan: Dan walaupun report ini sangkut dengan complain dia langsung tidak disiasat oleh kamu, betul terhadap Lim Keck Eng, betul? Yang kamu setuju tadi, betul? Just want to confirm that. No need to look, you did not investigate this report against Lim Keck Eng.

Noorariff: Betul.

(encl 2, p 178, line 3858–3888)

(re-examination)

Zetty: Tuan telah ditanya beberapa kali mengenai samada ada investigation terhadap Lim Keck Eng. Tuan katakan tiada. Boleh tuan terangkan mengapa tiada?

Noorariff: Laporan polis yang dibuat oleh emak plaintiff iaitu Tan Hoo Eng tidak ada kertas siasatan dibuka ke atas laporan polis itu tetapi laporan polis itu di masukkan sekali di dalam investigation paper 409.

(encl 2, p 217, line 4823–4828)

[15] This admission is significant for several reasons. Firstly, it directly contradicts the inspector's initial assertion that all reports were investigated equally, thereby undermining the credibility of the investigation. Secondly, it highlights a clear bias in the investigation process, where the authorities chose to prioritise one report over another without any apparent justification. By focusing predominantly on the allegations made by Lim Keck Eng and neglecting to adequately investigate the applicant's counter-report, the police failed to uphold the standard of impartiality required in a fair investigation.

[16] The lack of thorough investigation into the applicant's report not only suggests a lack of impartiality but also raises concerns about the fairness of the entire investigative process. In our system of legal proceedings, it is paramount that all parties are treated equally and that investigations are conducted without bias. The selective attention given to Lim Keck Eng's report over the applicant's indicates a departure from these principles, which could have serious implications for the fairness and integrity of the judicial process. This court considers this lack of impartiality as a fundamental issue, as it reflects a failure to ensure an unbiased investigation and potentially a miscarriage of justice.

PREFERENTIAL TREATMENT IN HANDLING THE LIM KECK ENG'S REPORT

[17] There is clear evidence that Lim Keck Eng's report was handled with preferential treatment, deviating from standard law enforcement practices. This deviation suggests a lack of impartiality, which compromises the integrity of the investigation process.

[18] During cross-examination, it was revealed that Insp Ariff was unusually instructed by his superior, ACP Latt Madzura, to personally oversee the taking down of Lim Keck Eng's police report. Typically, such tasks are handled by lower-ranking officers (usually an officer with the rank of 'Sarjan') unless exceptional circumstances warrant otherwise. This directive, confirmed as

irregular, raises questions about the motives behind it. Furthermore, the lack of reexamination on this issue fortifies the irregularity of the instruction. Insp Ariff's testimony on 29 December 2021 (encl 2, pp 137–140, line 2879–2938) to initiate the police report. Such access was described as highly unusual, as complainants do not typically meet with commissioners. Subsequently, ACP Latt Madzura directed the initiation of the criminal matter and appointed Insp Ariff as the investigating officer (encl 2: pp 155–156, line 3306–3330). This sequence of events strongly indicates preferential treatment for the complainant, undermining the impartiality of the investigation.

[19] During the civil proceedings, Insp Ariff confirmed that the instruction from a higher-ranking officer was unusual, suggesting that special attention was given to Lim Keck Eng's report. During the civil proceedings also, Insp Ariff did not deny to socialising with the complainant, Lim Keck Eng, and his son during the sessions court trial was in progress. This social interaction between the investigating officer and the complainant further indicates bias and a lack of impartiality, compromising the investigation from the outset:

> Bachan: Betul ya, Lim Keck Eng dan Moses pun tinggal sana. Hotel yang sama. Be frank and honest you are on oath. Because we have evidence that you are all together with you, correct, tell the truth to the lordship.
>
> Noorariff: Ada sekali sahaja.
>
> Bachan: Juga ada pernah bersosial dengan dia. Dinner?
>
> Betul? Don't try to deny. You are on oath please. I am warning you.
>
> Mahkamah: You are talking about Tan Hoo Eng?
>
> Bachan: Tan Hoo Eng's case. He was with the complainant and his sons, Lim Keck Eng and socialising.
>
> Mahkamah: Tahu, tahu, tak ingat, tak pasti.
>
> Noorariff: Saya tak pasti.
>
> (encl 2, pp 173–174, line 3753–3765)

[20] The combination of preferential treatment and social engagement implies a bias favouring Lim Keck Eng. The involvement of a higher-ranking officer without a justifiable reason, along with these personal interactions, taints the investigation and undermines the integrity of its findings.

[21] This court must consider these issues of preferential treatment and social interaction as indicative of a pattern of bias in the investigation. Below is the relevant portion of the cross-examination in Civil Suit No AA-22NCVC-136–11 of 2018

> Bachan: Biasanya sarjan, koperal, betul?

Noorariff: Betul.

Bachan: Baik sebelum 7 April YA, 2014 berapa laporan polis kamu ambil sendiri, tulis laporan polis terima laporan polis.

Noorariff: Tiada.

Bachan: Tidak ada. Itu pertama kali?

Noorariff: 2014 pertama.

Bachan: Ya?

Noorariff: 2014 itu pertama kali.

Bachan: Pertama kali, sebelum itu pun tidak ada bukan?

Noorariff: Tiada.

Bachan: Pada hari itu siapa yang arahkan kamu ambil laporan polis?

Noorariff: My superior.

Bachan: Correct. His name? Apa nama dia?

Noorariff: ACP Latt Madzura.

Bachan: What you said?

Noorariff: Assistant Commissioner Police.

(encl 2, p 138, line 2890–2906)

RIGHT TO A FAIR TRIAL

[22] In this case, compelling evidence demonstrates that biased investigative practices were employed, significantly undermining the applicant's right to a fair trial as guaranteed under art 5(1) of the Federal Constitution. This constitutional provision safeguards the right of every individual to an impartial and unbiased investigation. However, the investigation into the allegations made by the complainant, Lim Keck Eng, was conducted in a manner that clearly favoured the complainant over the applicant. In this case, reports filed by the applicant were not investigated at all, thereby compromising the investigation and violating the applicant's constitutional rights.

[23] The testimony of Inspector Sopawan in the civil proceedings, which was referred to earlier, further corroborates this claim. She admitted that the investigation predominantly focused on the allegations made by the complainant, Lim Keck Eng while neglecting the applicant's reports. This admission reveals a one-sided and biased approach, in direct breach of the principle of impartiality that is fundamental to a fair trial. The biased nature of the investigation denied the applicant an unbiased inquiry, thereby infringing

on her right to procedural fairness and casting serious doubt on the legitimacy of the investigation's findings.

[24] It is pertinent to refer to a passage from the case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631; [2010] 2 AMR 231, which provides the importance of procedural fairness in ensuring justice.

> [18] Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. *However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal.* Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr (as he then was) in *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242, where he held that:
>
> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right then, in the words of *Sandhawalia CJ in Madheshwardhari Singh v The State* (ibid) (*Madheshwardhari Singh and Anor v State of Bihar* AIR (Pat) 1986 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground. (Emphasis added.)

[25] The applicant's claim of an unfair investigation is well-supported by evidence of bias, and this court takes cognisance of the biased approach in the investigation conducted.

DENIAL OF EQUAL PROTECTION UNDER THE LAW

[26] In this case, there is substantial evidence from the civil proceeding showing that the applicant was denied equal protection under the law due to different treatment of reports filed by the applicant compared to those filed by the complainant, Lim Keck Eng. This unequal treatment constitutes a violation of the applicant's rights under art 8(1) of the Federal Constitution, which ensures equal protection under the law for all individuals.

[27] The investigation into the applicant's report was not conducted with the same urgency or thoroughness as the complainant's, demonstrating a clear denial of equal protection. Inspector Sopawan's testimony confirmed this bias, revealing that the applicant's allegations were considered secondary and not given equal consideration. This biased approach by the police indicates a failure

to treat both parties fairly, violating the principles of impartiality and equal legal protection.

[28] Such actions undermine the applicant's constitutional rights and raise serious concerns about the integrity of the investigation. This court must address this denial of equal protection as a significant violation of justice, ensuring that all parties are treated equally and that public confidence in the legal system is maintained.

IMPACT ON THE FAIRNESS OF THE CRIMINAL PROCEEDINGS

[29] In this case, the biased investigation has significantly disadvantaged the applicant, compromising the fairness of the criminal proceedings. The investigation was not conducted impartially, as the applicant's report was not given the same consideration as the complainant's. This lack of fairness the applicant submits has affected her ability to present an effective defence, leading to a potential miscarriage of justice.

[30] Insp Ariff admitted that the directive to prioritise the complainant's report resulted in neglecting critical investigative steps that could have supported the applicant's claims. This compromised approach undermined the applicant's right to a fair trial and contributed to an unfair trial process. This court acknowledges this biased investigation as seriously hampered the applicant's defence.

OTHER ISSUES

Mere denial of all substantial applicant's averment

[31] All of the above contentions by the applicant were affirmed in the applicant's supporting affidavit (encl 2, paras 19–49), which is supported by documentary evidence and admissions under oath from the investigating officers themselves during a trial.

[32] More importantly, these allegations were not categorically refuted by the deputy public prosecutor ('DPP') in their response (affidavit in reply, encl 12). The DPP merely offered a very general or 'bare' denial, which lacks the substantive rebuttal required to challenge the specific claims made by the applicant. It is apt to refer to a case on point that is *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 MLJ 281; [1995] 1 CLJ 609; [1995] 1 AMR 622; [1995] 1 MLRA 48, where it was held that a bare denial is insufficient and does not constitute a proper defence. Therefore, in the absence of a credible rebuttal, the applicant's positive averments are deemed admitted.

CASE LAWS CONSIDERED

[33] In a fairly recent Federal Court case of *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811; [2021] 9 CLJ 414; [2021] 8 AMR 719; [2021] MLRAU 168, the Federal Court articulated the fundamental importance of the right to a fair trial as enshrined in the Federal Constitution. The Federal Court clearly stated that 'where an accused person is denied his right to a fair trial, the result of that breach warrants an acquittal and discharge'. This principle reinforces that a fair trial is a cornerstone of the justice system, and any breach of this right fundamentally affects the integrity of the judicial process.

[34] In the present case, as was clearly pointed out earlier, the applicant's right to a fair trial was compromised due to biases and prejudices in the conduct of the investigation, which contravened the principles of justice. Given the Federal Court's position in *Yahya*'s case, if it is determined that the applicant's right to a fair trial has indeed been breached, then this court is compelled to ensure justice by granting an acquittal and discharge of the applicant. *Yahya*'s case mandates that any infringement on the right to a fair trial cannot be overlooked and must be rectified by nullifying any conviction or charges stemming from such a violation.

[35] The principle established in the Supreme Court of India decision in *Babubhai v State of Gujarat & Ors* 2010 (12) SCC 254 is also directly applicable in the present case. Similar to *Babubhai*'s case, where only one party's police report was investigated and led to the charges being struck out, the investigation in the present case has been one-sided, biased, and prejudiced against the applicant. The police failed to investigate the applicant's police report, choosing instead to focus solely on the report lodged by the complainant, Lim Keck Eng. This selective investigation has resulted in multiple prosecutions that are unjust and legally flawed.

[36] The Supreme Court in *Babubhai*'s case clearly stated that a charge sheet, which is the outcome of an investigation, cannot be valid if the investigation itself was not conducted fairly. A biased and tainted investigation fails to meet the minimum requirement of the rule of law and constitutional rights to a fair trial. In our case, the prosecution has progressively reduced the charges against the applicant by approximately RM41m over four prosecutions, highlighting a pattern of arbitrary and capricious conduct. Such a drastic reduction in charges suggests that the initial investigations were neither fair nor impartial, thereby making the charges invalid.

[37] The principle set forth in *Babubhai* resonates profoundly with the present circumstances in that the applicant was unlawfully, wrongfully, and

unconstitutionally charged and harassed in an unwarranted manner.

[38] Given the proven breach of the applicant's constitutional right to a fair investigation and fair trial under art 5(1) of the Federal Constitution, this court must intervene to prevent injustice and uphold the principles of fairness and justice which warrant an acquittal and discharge of the applicant. The relevant excerpt from *Babubhai,* which bears out the point is reproduced here:

> 34. In the instant case, admittedly, the High Court has given detailed reasons for coming to the conclusion that the investigation has been totally one-sided, biased and mala fide. *One party has been favoured by the investigating agency*. The natural corollary to this finding is that the other party has been harassed in an unwarranted manner. *Thus, the cause of the other party has been prejudiced*. The charge sheets filed by the investigating agency in both the cases are against the same set of accused. *A charge sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge sheet. Such investigation would ultimately prove to be precursor of miscarriage of criminal justice*. In such a case the court would simply try to decipher the truth only on the basis of guess or conjunctures as the whole truth would not come before it. It will be difficult for the court to determine how the incident took place wherein three persons died and so many persons including the complainant and accused got injured. *Not only the fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent* and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted to conduct an investigation in tainted and biased manner. Where non- interference of the court would ultimately result in failure of justice, the court must interfere.

[39] The Federal Court in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 ; [2021] 6 CLJ 199; [2021] 5 AMR 23; [2021] 5 MLRA 1 is also directly relevant to the present case. The Federal Court in *Sundra Rajoo* emphasised that the Judiciary has a constitutional duty to review unlawful actions or inactions of the Executive and Legislative branches to ensure justice and fairness within the legal system.

[40] In the present case, there have been significant concerns regarding the fairness and impartiality of the investigations and prosecutions against the applicant. The investigation appears to have been conducted in a biased manner, focusing exclusively on the complainant, Lim Keck Eng's report, while completely ignoring the applicant's police report. This has led to a series of incongruent prosecutions where each charge shows severe reductions, casting doubt on the integrity and fairness of the process.

[41] Given these circumstances, it is imperative for this court to exercise its constitutional duty to scrutinise these actions and provide appropriate remedies. The sessions court from which this case emanated and where trial

awaits do not have the jurisdiction to determine the issues ventilated here. This the learned sessions court judge had rightly refused the application previously made by the applicant. Therefore, it is appropriate for this court, in line with the principles set forth in *Sundra Rajoo*, to quash the proceedings as the prosecution's actions have been unlawful or unfair. This proposition is clearly articulated by the Federal Court in *Sundra Rajoo*, referring to another decision of the Supreme Court in these words:

> [81] With respect, we agreed with the appellant. The decision of the Supreme Court in *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 2 CLJ 1458; [1991] 1 CLJ Rep 183 ('Karpal Singh') provided a complete answer to the issue. At pp 548–549 (MLJ); pp 191–192 (CLJ), Abdul Hamid Omar LP said:
>
> > There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though postponements are needed. *If any party feels that* the charge and consequent proceedings are illegal on the face of the record, which we feel is rare, *his remedy is to take up appropriate proceedings before a High Court to quash the charge and the whole proceedings producing evidence to the satisfaction of the trial judge to adopt such a case*. It is absurd and against common sense to believe that the legislature ever expected members of subordinate judiciary to exercise such vast powers, trespassing into the public prosecutor's area.

[42] At another place in the judgment the following passage by the Federal Court is very suitable to the present case, where it justifies the approach taken to challenge the decision to prosecute the applicant:

> [87] It is clear that save in wholly exceptional circumstances, the proper course to take is to challenge the decision to prosecute in the criminal courts.
>
> [88] Having said that, we hasten to add that the decision by the AG/PP to prosecute can have enormous consequences for the accused person, the injured party and society at large. For an accused in particular, the consequences of being charged include the irretrievable loss of reputation, distress and disruption of work and family relations. If the law has been misunderstood or misapplied by the AG/PP, as apparent in the present appeal, the appellant ought to be given an opportunity to have such discretion reviewed by way of judicial review. Further, the court has the responsibility to prevent the criminal justice system from being arbitrarily used against an individual and to prevent an innocent person from going through a criminal proceeding if the AG/PP had failed to exercise his discretion in accordance with law to prosecute. To allow a matter without merit to be pursued through criminal court would have huge impact on the accused's life and career and would cause unnecessary expenditure of time and effort and would place extra costs on the public purse.
>
> [89] In an appropriate and exceptional cases, it would be better to quash the decision to prosecute before the criminal proceedings commence so that unnecessary suffering of the accused caused by improper prosecution can be minimised.

APPLICANT'S PREVIOUS APPLICATIONS

[43] The applicant's previous applications, including the first transfer application (Criminal Application No AA-44–84–12 of 2019), the application to stay proceedings and quash charges (Criminal Application No AA-44–22–03 of 2018), the originating summons challenging the AMLAFTA Orders (No AA-24NCVC-96–05 of 2017), the 2020 Ipoh Criminal Application (Criminal Application No AA-44–1–01 of 2020), and the second transfer application (Criminal Application No AA-44–48–08 of 2022), were all distinct from the current application for several reasons.

[44] Firstly, these previous applications addressed different legal and procedural issues, such as the validity of specific orders, the discretion of the prosecution, and the appropriate forum for trial. They were evaluated at a time when the proceedings were at an earlier stage, without the benefit of the new evidence from the civil proceeding and recent legal developments now available. These previous applications were dismissed largely on procedural grounds, determining that there were no serious legal questions justifying a transfer or an immediate appeal. For instance, the courts found that the prosecution was acting within its discretion and that the sessions court judge could address the issues as the trial progressed.

[45] On the other hand, the current application is fundamentally different because it is grounded on new evidence from the civil proceedings and recent decided cases by the apex court that have come to light since the earlier applications were considered. This new evidence suggests substantial procedural and constitutional violations that were not previously addressed, such as the failure to ensure a fair investigation and the potential misuse of prosecutorial discretion. Furthermore, recent legal developments, including a decision on point from the apex court, have clarified the principles surrounding fair trial rights and prosecutorial conduct, creating a clear legal certainty that necessitates a proper evaluation of the applicant's case.

[46] The previous applications do not preclude the current application because the current application raises constitutional questions, particularly in light of the new evidence from the civil proceeding that points to a biased investigation and prosecutorial misconduct. The applicant argues that the High Court, with its broader jurisdiction and inherent powers, is the proper venue to address these issues comprehensively, ensuring that justice is served and constitutional rights are upheld. Therefore, the dismissal of the previous applications does not impact the validity of the current application, which seeks to address issues that have only recently come to light and were not considered in earlier proceedings.

CONCLUSION

[47] The evidence presented in the civil proceedings conclusively demonstrates a pattern of biased and unfair investigation by the police, significantly infringing upon the applicant's constitutional rights under arts 5(1) and 8(1) of the Federal Constitution. The investigation's preferential treatment of the complainant's report, combined with the neglect of the applicant's report, constitutes an abuse of process and a breach of fundamental principles of justice.

[48] Considering the serious procedural and constitutional violations evident in this case, this court rules in favour of the applicant's application in AA-44–30–08 of 2023. Accordingly, the following orders are made:

(a) all charges under s 409 of the Penal Code in the criminal cases numbered AA-62K-(37–38)–10 of 2017 and AA-62K-(201–209)–08 of 2019 are hereby set aside, quashed, or permanently stayed. The applicant/accused is acquitted and discharged from all such charges; and

(b) all charges under s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act ('the AMLATFA'), read together with sub-s 87(1) of the AMLATFA, in the criminal cases numbered AA-62K-(39–45)–10 of 2017 and AA-62K-(114–122)–12 of 2017 are also set aside, quashed, or permanently stayed. The applicant/accused is acquitted and discharged from all such charges.

[49] This court also finds that the bias and prosecutorial misconduct have significantly compromised the fairness of the investigation and criminal proceedings. Upholding the applicant's constitutional rights and the principles of justice and fairness demands that all charges be nullified. This decision reinforces the rule of law and ensures that the applicant, presumed innocent until proven guilty, is afforded full protection under the Federal Constitution.

All CBT and AMLA charges set aside, quashed, or permanently stayed; applicant acquitted and discharged from all charges.

Reported by Dzulqarnain Ab Fatar